IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.261 OF 2001

Dr. Fernando Mascarenhas,
3 Bench Nest Miramar,
Panaji, Goa. ... Petitioner.

Versus

1. Administrative Tribunal,
with office at Coelho
Pereira Building,
Dr. Dada Vaidya Rd.,
Panaji, Goa.

2. Addl. Rent Controller,
Mapusa, Goa.

3. Mr. Vilito D'Souza,
since deceased,
represented by his
legal representatives:

a) Mrs. Maggie D'Souza,
widow of Mr. Vitito D'Souza,

b) Mr. Elvis D'Souza,
son of Mr. Vilito D'Souza,

c) Mr. Robin D'Souza,
son of Mr. Vilito D'Souza,

All residing at Hotel Safari,
Mapusa, Bardez, Goa. ... Respondents.

Mr. J. E. Coelho Pereira, Senior Advocate with Advocate Mr. V. Korgaonkar for the petitioner.

Mr. Sudin Usgaonkar, Advocate for the respondents.

CORAM : DR. S. RADHAKRISHNAN, J.

DATE : OCTOBER, 11 2006.

ORAL JUDGMENT :

1. Heard learned Counsel for the petitioner and the respondents.

2. By this Petition the petitioner is challenging the Judgment and Order dated 17.8.2000 passed by the learned Administrative Tribunal, Goa allowing the appeal whereby setting aside the Judgment and Order which was passed by the Additional Rent Controller, Mapusa dated 27.2.1996.

3. The brief facts are that the petitioner is the landlord, who owns a building which consists of a ground floor and first floor. On the ground floor there are shops let out on rent to various persons who carry on different businesses in the shops. The dispute involved in the present matter pertains to the premises on first floor which is known as “Hotel Safari”. The landlord had given the aforesaid first floor premises on a monthly tenancy to the husband of respondent no.3 Vilito D'Souza who is no more and is being represented by his legal representatives being his wife and two sons. The said premises was given on a monthly rent of Rs.400/-. It appears that the said tenant was allowed to run a Hotel on the first floor wherein there are a number of rooms which is treated as a

lodge, and these rooms were given on hire to various lodgers on daily basis. It appears that the tenant was also residing on part of the premises on the first floor and had made arrangements for setting up of a Restaurant and Bar also on the first floor and in addition there were 18 rooms which were on the first floor. The main grievance of the landlord was that the said respondent/tenant had unlawfully sub-let the five rooms to five different individuals who were carrying on various professional activities in the said premises. In view of the above, the petitioner/landlord had terminated the tenancy and demanded the premises back on two grounds i.e. change of user since these five rooms were used for the purpose, other than for which it was, given, that is user other as a lodge, and the second ground was on the ground of illegal sub-letting. The landlord pressed only the ground of sub-letting. The landlord had examined himself and had clearly deposed that five persons, namely one Advocate Shri Phadte, one Mr. L.K. Paras, V. Soares, Vasant Karekar and L.D. Costa, had their offices and each of them had displayed their board displaying their names at the entrance of the room in which they were occupying for office purposes. The petitioner/landlord had also taken photographs with regard to the same and produced the original photographs. It is the categorical evidence on behalf of the petitioner/landlord that the respondent/tenant was allowed to only run a lodging and boarding house and was not allowed to sub-let the same. In that regard, it is clear that from the lease agreement in

clause 4 which clearly states that there will be no sub-letting. The petitioner/landlord had also examined the photographer who had taken the photographs to indicate that all these five persons were carrying on professional activities. Even the photographer had deposed before the Rent Controller that all the rooms had separate entrance, and separate partition and each room had a separate door. The said photographer had produced the photographs to indicate that the photographs were taken on a particular day. The Petitioner landlord had examined the Mukadam, who was also acting as his rent collector. He has also deposed that the above five persons were carrying on their professional activities in those five rooms. He has stated that they were carrying on various professions as an Advocate, Passport agent, Engineer Draftsman, etc. He has also deposed that they were sub-lettees and Municipality was charging higher municipal taxes, as result thereof.

4. The respondent/tenant by then had expired and his widow who was running the said Safari Hotel gave evidence on behalf of the respondent/tenant. In the evidence the respondent/tenant in clear terms had admitted that she was maintaining a hotel register wherein the details of the lodgers are mentioned. She had also mentioned that the hotel used to issue receipts to the lodgers and the register with regard to the Rent receipts was also maintained. However, on the next date, though she had earlier agreed to produce the same, she declined to produce

both the lodgers register as well as the register regarding rent receipts. In cross examination, the said respondent/tenant had categorically admitted that all those five occupants used to lock their respective rooms and used to keep their keys with them and their exclusive possession was not disputed.

5. Appreciating the above material and evidence, the learned Additional Rent Controller by his Judgment and Order dated 27.2.1996 came to a clear finding that the aforesaid five rooms were illegally sub-let as sub-letting was not permitted and that the petitioner/landlord had not given consent for such sub-letting. The Additional Rent Controller has analysed the evidence produced by the petitioner/landlord and based on the said evidence the Additional Rent Controller came to the finding that the respondent/tenant had given the said five rooms exclusively to five persons by sub-letting. Accordingly, the Additional Rent Controller, directed the tenant/respondent to hand over possession of the entire premises back to the Petitioner/landlord.

6. Aggrieved thereby, the respondent/tenant had approached the Administration Tribunal at Goa against the said Judgment and Order of the Additional Rent Controller.

7. The learned Administration Tribunal, Goa by its Judgment

and Order dated 17.8.2000 has reversed the same and allowed the appeal. The same is being challenged in this Petition.

8. The learned Senior Counsel Mr. Pereira who is appearing on behalf of the petitioner/landlord pointed out a very serious apparent error on the face of the record in the said Judgment and Order of the learned Administration Tribunal, Goa. The learned Senior Counsel Mr. Pereira brought to my notice that the learned Administration Tribunal has observed as under :-

> "It is also an admitted fact that the Appellants are residing in the portion of the suit premises and the remaining portion of the suit premises is used for the purpose of lodging. Therefore, in the facts and the circumstances of this case, it cannot be said that the Appellants had parted with legal possession of the suit premises to third parties."

Similarly, the Administration Tribunal has relied on the same order and observed as under :-

> "As stated above, in the case before me also the Appellants are residing in the part of the suit premises and the entire control over the suit premises is also with the Appellants."

9. The learned Senior Counsel for the petitioner/landlord, Mr. Pereira contended that merely because the tenant was staying in part of the premises does not mean that the tenant had complete control over these five rooms which were sub-let. The learned Senior Counsel pointed out that from the evidence, it is amply clear that all these five persons who were occupying the five rooms had their own lock and key and were carrying on professional activities. In the light of the same, there is no evidence to show that the respondent was having complete control which were given to these five individuals who were carrying out different professional activities. In that behalf, Mr. Pereira referred to a well known Judgment of the Supreme Court in ***Associated Hotels of India Ltd., v. R.N. Kapoor AIR 1959 SC 1262*** which was later followed by another Judgment of the Supreme Court in ***Associated Hotels of India Ltd., v. S.B. Sardar Ranjit Singh AIR 1968 SC 933*** wherein the Supreme Court while dealing with the issue of sub-letting in hotels has observed in paragraph 5 and 6 that “The onus to prove sub-letting was on the respondent who discharged the onus by leading evidence showing that the occupants were in exclusive possession of the apartments for valuable consideration. The appellant chose not to rebut this prima facie evidence by proving and exhibiting the relevant agreements. The documents formed part of the appellant's case.” In this context the Supreme Court had clearly pointed out as far as a lodger is concerned,

he is only a licensee and in that behalf the Supreme Court has referred to the Halsbury's Laws of England, wherein “Lodger” is described as under:-

> “A lodger who has no separate apartment is only a licensee, and, even though he has a separate apartment, he has not in law an exclusive occupation, and is therefore in the position of a licensee, if the landlord retains the general control and dominion of the house, including the part occupied by the lodger; but, if in fact the landlord exercises no control over that part, the occupier is a tenant. The occupier does not, however, become a lodger merely by reason of the fact that the landlord resides on the premises and retains control of the passages and staircases and other parts used in common.”

10. Thereafter, the learned Sr. Counsel Mr. Pereira also referred to the Judgment ***Smt. Rajbir Kaur and another v. M/s S. Chokosiri and Co., AIR 1988 SC 1845*** wherein the Supreme Court has observed as far as sub-letting is concerned as under :-

> “If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found unacceptable in

the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements betweens the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that, appellants having been forced by the Courts below to have established exclusive possession of the

> ice-cream vendor of a part of the demised-premises and the explanation of the transaction offered by the respondent having been found by the Courts below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found."

11. Thereafter Mr. Pereira referred to the Judgment of the Kerala High Court, ***Kovamon alias K.V. Aboobacker and other v. Moidenkutty and others, All India Rent Control Journal 1979(1) 310*** wherein the Kerala High Court has discussed in detail about a tenant in a lodging house and holds that in cases of the hotel or lodging house, it must be part of the hotel or lodging house should fulfill two conditions (i) its must be part of a hotel or lodging house in the physical sense and (ii) its use must be connected with the general purpose of the hotel or lodging house. In the said Judgment the Kerala High Court has referred to another Judgment of ***E.V.Mathal v. The Subordinate Judge, Kottayam and others AIR 1970 SC 337*** wherein the lodger who was carrying on his profession work who had also installed a telephone, it was

construed that it amounted to subletting.

12. Mr. Pereira pointed out that the evidence of the respondent/tenant is itself clear that all the aforesaid five persons were having exclusive possession of the rooms by using their own locks and keys and kept with them, over which the respondent/tenant had no control and that they were carrying on their professional activities. In the light of the aforesaid evidence the learned the Additional Rent Controller had rightly decreed the application in favour of the petitioner/landlord. Mr. Pereira contended that the learned Administrative Tribunal, Goa while allowing the appeal, had committed a fatal error of law in holding that the respondent/tenant had exclusive control merely because the respondent/tenant was staying in part of the premises on the first floor. The argument of Mr. Pereira is that the five persons had separate and exclusive possession which was handed over to the respondent/tenant for valuable consideration. In view thereof, the said respondent/tenant had no control of the said five rooms. Mr. Pereira pointed out that there is a clear admission of the respondent/tenant that the five persons used to lock their rooms and have their own keys with them.

13. Under these circumstances, the learned Senior Counsel submitted that the order of the learned Administrative Tribunal suffers from a patent error from the face on record and is liable to be set aside.

14. Learned Senior Counsel for the Petitioner, Mr. Pereira very categorically states that though the petitioner has mentioned in the petition Articles 226 and 227 of the Constitution of India, however he has made it clear, that the Petitioner is invoking only Article 227 of the Constitution of India.

15. The learned Counsel for the respondent Mr. Usgaonkar sought to contend that those five persons were only lodgers, however he conceded that though the respondent/tenant had agreed to produce before the Additional Rent Controller the register of the lodgers as well as the register of receipts but the same were not produced even before this Court. Learned Counsel for the respondent could not dispute the evidence of the respondent/tenant categorically mentioning that the aforesaid five persons used to lock their own premises and keep the keys with them. Mr. Usgaonkar sought to rely on the Judgment of the Supreme Court of ***Delhi in M/s Delhi Stationers and Printers v. Rajendra Kumar AIR 1990 SC 1208*** wherein in fact the observation in paragraph 5 of the judgment would assist the petitioner/landlord. In the said judgment it was clearly mentioned that subletting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right must be in lieu of payment of some compensation or rent. There is no dispute that in the present case that the aforesaid five

persons were regularly paying compensation to the respondent/tenant and the exclusive possession has been admitted by the respondent/tenant herself.

16. Next Judgment referred by Mr. Usgaonkar is ***Surendra Kumar Jain v. Royce Pereira in (1997) 8 SCC 759*** wherein, in paragraph 16 the Court has explained the concept of the paying guest or a lodger. The reference of the case therein, wherein the landlord had allowed the paying guest to use two rooms and kitchen, while the owner was also residing in the same premises, it was held to be a paying guest arrangement and not an agreement of tenancy. Whereas, in the instant case, the aforesaid five persons were paying compensation for the exclusive possession of each of the five rooms.

17. Finally Mr. Usgaonkar relied upon the Judgment of ***Ashwani Kumar Singh v. Public Service Commission and others in AIR 2003 SC 2661,*** wherein in paragraph 11 and 13 the Supreme Court has held that the Judgments of the Courts are not construed as statutes. The aforesaid Judgment will be of no assistance, as in the instant case we are concerned with the evidence which has been recorded before the Additional Rent Controller, which clearly establishes exclusive possession and payment of compensation.

18. Mr. Usgaonkar also referred to the definition of a “lodger” in Black's Law Dictionary as under :-

> “1) A person who rents and occupies a room in another's house. 2) A person who occupies a designated area in another's house but acquires no property interest in that area, which remains in the owner's legal possession.”

19. Having heard both the learned Counsel and perusing both the Judgments and also after scrutinising the evidence, it is abundantly clear that the learned Administrative Tribunal has committed an error apparent on the face of the record, which observations are quoted in paragraph 8 hereinabove. The Administrative Tribunal had proceeded on the basis of a wrong proposition of law, and committed the said error in the said judgment.

20. As clearly pointed out by the learned Counsel for the petitioner, the Administration Tribunal has wrongly proceeded on the basis that merely because the respondent/tenant was staying in part of the premises the respondent/tenant had full control over five rooms with separate lock and key which was in exclusive possession of those five sub-lettees. In view of the aforesaid patent error, and in view of the evidence clearly led before the Additional Rent Controller, the

Administration Tribunal could not have interfered with the said order. Under the aforesaid facts and circumstances, the impugned Judgment suffers from a patent error. Hence the Judgment dated 17.8.2000 stands quashed and set aside. Rule is made absolute, however with no order as to costs.

DR. S. RADHAKRISHNAN, J.

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